United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1574

To be argued by
JEREMY G. EPSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1574

B/S

UNITED STATES OF AMERICA,
Appellee,

—v.—

EDWARD MAULDIN, JR.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

TABLE OF CASES

PAGE

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Preliminary Statement

Edward Mauldin, Jr., appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on December 10, 1976, after a two day trial before the Honorable John M. Cannella, United States District Judge, and a jury.

Indictment 76 Cr. 382, filed April 15, 1976, charged Mauldin in Count One with bank robbery, in Count Two with bank larceny, and in Count Three with armed bank robbery in violation of Title 18, United States Code, Sections 2113(a), (b) and (d), respectively.

Trial commenced against Mauldin on November 8, 1976 and concluded on November 9, when he was found guilty on all counts. On December 10, 1976, Mauldin was sentenced to an indeterminate term as a Youth Of-

fender pursuant to the provisions of Title 18, United States Code, Section 5010(b) by the Honorable Inzer B. Wyatt.* The sentence was to run concurrently with a similar sentence imposed upon Mauldin by the Honorable Whitman Knapp, before whom Mauldin had also been convicted of bank robbery.** Mauldin is now serving these sentences.

Statement of Facts

The Government's Case

On January 16, 1975, at approximately 10:00 A.M., three men entered a branch of the North New York Savings Bank located at 210 East 188th Street, Bronx, New York. All three were black, and all three wore blue "snorkel jackets" with fur lined hoods (Tr. 12-14).*** One man approached various bank employees, displayed a gun and ordered everyone to the floor (Tr. 24). A second robber vaulted the teller's counter and looted several cash drawers of what was later found to be $20,600 (Tr. 13-14, 33). The third robber, Edward Mauldin, Jr., stationed himself at the doorway of the bank, directly beneath the surveillance camera. During the robbery he repeatedly jumped up and hit the camera with a folded newspaper which he carried in his left hand (Tr. 16-17, 24, 29-30). At the conclusion of the rob-

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* The case had been transferred to Judge Wyatt after trial because Judge Cannella's illness required an extended absence from his duties. See Rule 25(b) of the Federal Rules of Criminal Procedure.

** Mauldin filed a notice of appeal from his earlier conviction, docket number 75-1348. This Court dismissed that appeal on January 20, 1976, after Mauldin's counsel had filed a brief pursuant to *Anders* v. *California*, 386 U.S. 738 (1966).

*** "Tr." refers to the trial transcript; "GX" refers to Government Exhibit; "Br." refers to appellant's brief.

bery, which lasted between three and five minutes, all three men fled the bank (Tr. 20, 26).*

Later that same day, the bank was searched for evidence by agents of the Federal Bureau of Investigation. One agent, Michael J. McHale, removed approximately thirty fingerprint "lifts" from various areas of the bank. Among these was one lift taken from the bottom of the bank surveillance camera (GX 5). According to McHale, the camera was between seven and seven and one half feet from the floor of the bank. McHale, who is 6'3" tall, stated that he could only touch the camera by jumping, and that he needed a ladder to remove the fingerprint lifts (Tr. 38-43, 46-48).

The lift taken from the bottom of the surveillance camera was examined in Washington, D.C. by Jack W. Oliver, a fingerprint specialist employed by the F.B.I. He found that the lift contained latent impressions of a left palm and a left ring finger. Upon comparing these prints with known fingerprints of Mauldin, he concluded that both the palmprint and the fingerprint belonged to Mauldin (Tr. 56-64).**

The Government also adduced evidence of another bank robbery committed by Mauldin. On April 3, 1975, he entered a branch of the First National City Bank located at 58 Duane Street, in Manhattan. He approached a teller, drew a gun, and ran out of the bank as soon as he had been handed a quantity of cash. He was pursued by two New York City police officers, Raymond Kranglewitz and George Taylor, who happened to

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* The other two robbers have not yet been identified.

** It was also established that Mauldin is 6'3" tall (Tr. 48) and has never maintained an account at or been employed by the North New York Savings Bank (Tr. 33-34).

be in the bank during the robbery. He was apprehended by Kranglewitz just outside the bank, at which time he dropped the gun and the bag of money he was carrying. He was wearing a blue "snorkel jacket" (Tr. 82-86).*

The Defense Case

Mauldin offered no evidence.

ARGUMENT

The trial court's decision to admit evidence of another bank robbery committed by Mauldin was a proper exercise of discretion.

The sole question presented on this appeal is whether Judge Cannella abused his discretion by admitting evidence of the April 3, 1975 bank robbery committed by Mauldin. Mauldin argues that he did, and that this error was of sufficient magnitude to require reversal of his conviction. This argument misstates the law of the Circuit and misunderstands the facts of the case.

The law is well settled in this Circuit that evidence of other crimes is admissible, if relevant, except when offered solely to prove criminal character or disposition. *United States* v. *Chestnut*, 533 F.2d 40, 49 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3250 (Oct. 5, 1976); *United States* v. *Santiago*, 528 F.2d 1130, 1134 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3253 (Oct. 5, 1976); *United States* v. *Leonard*, 524 F.2d 1076, 1091 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976); *United States* v. *Papadakis*, 510 F.2d 287, 294-5 (2d Cir.), *cert. denied* 421 U.S. 950 (1975); *United States* v. *Williams*, 470 F.2d 915, 917

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* Mauldin was indicted for that robbery (75 Cr. 399) and convicted after a jury trial before Judge Whitman Knapp.

(2d Cir. 1972); *United States* v. *Johnson*, 382 F.2d 280, 281 (2d Cir. 1970); *United States* v. *Deaton*, 381 F.2d 114, 117 (2d Cir. 1967). Among the purposes for which prior and subsequent similar acts are admissible are proof of knowledge, intent, identity, and plan or design. *United States* v. *Miller*, 478 F.2d 1315, 1318 (2d Cir.), *cert. denied*, 414 U.S. 851 (1973); *United States* v. *Friedman*, 445 F.2d 1220, 1224 (2d Cir. 1971); *United States* v. *Johnson*, *supra*. The Government is entitled to introduce such evidence in its direct case in order to meet its burden of establishing the essential elements of the offense charged and need not wait until such elements are put in issue by the defendant. *United States* v. *Johnson*, *supra*.*

Rule 404(b) of the Federal Rules of Evidence has codified the pre-existing law in this Circuit, and reads as follows:

> "Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Evidence of the April 3, 1975 bank robbery was admissible for either of two distinct purposes: proof of identity, and proof of absence of mistake or accident. The first of these alone provides sufficient justification for Judge Cannella's ruling. In this case, as in the majority of bank robbery prosecutions, the sole issue be-

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* This Court has never drawn any distinction between prior and subsequent similar acts. *See United States* v. *Super*, 492 F.2d 319, 323 (2d Cir.), *cert. denied*, 419 U.S. 876 (1974); *United States* v. *Nathan*, 476 F.2d 456, 459-460 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973).

fore the jury was identity. The defense did not dispute that the North New York Savings Bank was robbed of $20,600 on January 16, 1975; even Mauldin's counsel conceded in both his opening (Tr. 9) and his summation (Tr. 113-14) that the only question in the case was whether Mauldin was one of the three robbers. Because identity is among those purposes explicitly recognized in Rule 404(b) as grounds for the admission of similar act evidence, proof of the April 3 bank robbery was clearly admissible on that theory alone.

The evidence was equally admissible on another theory. During the trial, Mauldin's counsel virtually conceded that the surveillance camera bore Mauldin's fingerprints. His cross-examination of the Government's fingerprint expert consumed only three pages of transcript (Tr. 65-67) and did not challenge any of the witness' conclusions. Similarly, in his summation, counsel stated, "I am assuming everything you heard from the witness stand is the gospel truth. Every single witness that took the stand testified truthfully, followed his or her oath, told you what they saw and could remember. There is no way of disputing what those witnesses said." (Tr. 118) The force of the fingerprint evidence was challenged in one respect only: defense counsel argued both during cross-examination (Tr. 67) and in summation (Tr. 123-124) that the Government could not prove *when* the fingerprint had been placed on the camera. The defense thus conceded, by implication, that Mauldin had touched the surveillance camera, and argued merely that Mauldin must have touched it at some time other than during the robbery. In *United States* v. *Miller*, 478 F.2d 1315 (2d Cir.), *cert. denied*, 414 U.S. 851 (1973), this Court upheld the admission of similar act evidence to rebut this argument. In *Miller*, the Government was permitted to prove a defendant's participation in another bank robbery where the essential evidence against him in the robbery for which he was indicted was that he had acted as a chauffeur and lookout for those who robbed the bank.

This Court held that "[t]he uncharged bank robbery, however, could have been proven on the Government's direct case to show . . . that the appellant was not merely an innocent participant in the robbery for which he was tried." 478 F.2d at 1318. Because Mauldin's defense amounted to the contention that he was at some time in the bank for wholly innocent reasons, introduction of a similar criminal act was appropriate here, as in *Miller*, to rebut this claim of innocent presence.

Mauldin's principal objection to the admission of this evidence is the alleged dissimilarity between the two bank robberies. In formulating this argument, however, he misstates the standard governing the admissibility of similar acts in this Circuit. In his brief, he states that "[w]hile a similar act may be admissible to prove identity of the perpetrator of the crime charged, it is essential as a preliminary matter for the Government to establish that the basic physical elements of both crimes are identical." (Br. 7). Although citations to three Second Circuit cases, *United States* v. *Chestnut*, *supra*; *United States* v. *Santiago*, *supra*; and *United States* v. *Leonard*, *supra*, follow, this formulation appears *in haec verba* only in *United States* v. *Pollard*, 509 F.2d 601 (5th Cir. 1975). The governing standard in this Circuit, as stated in *United States* v. *Leonard*, *supra*, is quite different: "[t]he probative value of similar acts used to prove wilfulness or intent is dependent on the existence of a close parallel between the crime charged and the acts shown". 524 F.2d at 1091.

The two bank robberies proved here are more than sufficiently similar to meet the standard that prevails in this Circuit. Both robberies took place in the morning, one at 10:00 A.M. and the other at 11:00 A.M. Both were committed with the aid of hand guns. Both took place in New York City within a span of less than three months. Finally, and, we submit, most importantly, both were committed by men wearing blue "snorkel jackets".

The only significant dissimilarity is that one robbery was committed by three individuals, and the other by one.* That is scarcely sufficient dissimilarity to preclude introduction of the April 3 robbery. This Court has never required absolute identity between the crimes being tried and those which the Government has sought to prove as similar acts.** Moreover, the opportunity for variety in the commission of armed bank robberies is not great; most such robberies adhere to a predictable pattern. Probably for that reason, every reported case that our research has located has upheld the admission of evidence of other bank robberies in a bank robbery prosecution. See *United States* v. *Miller*, *supra*; *United States* v. *Pollard*, *supra*; *United States* v. *Wells*, 431 F.2d 434 (6th Cir. 1970), *cert. denied*, 400 U.S. 997 (1971). Nothing in this case warrants departure from these precedents.

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* In his brief, Mauldin makes much of the difference between the supposed "amateurishness" of the April 3 bank robbery and the "professional quality" of that committed on January 17. There was little amateurish about the April 3 bank robbery except that Mauldin was caught. Had he not had the misfortune to rob a bank that had two policemen as customers, Mauldin's second effort would probably have been as successful as his first.

** This Court has sanctioned the admission of evidence of other crimes far less similar to those being tried than the two bank robberies in question here. In *United States* v. *Leonard*, *supra*, a prosecution for filing false income tax returns, this Court upheld the admission of evidence that the defendant had submitted an affidavit to the Internal Revenue Service which falsely stated that he had no foreign bank accounts. In *United States* v. *Kaufman*, 453 F.2d 306 (2d Cir. 1971), a prosecution for filing false affidavits under the Soldiers and Sailors' Civil Relief Act, the defendant's tax returns, which contained false statements, were admitted into evidence. In *United States* v. *Williams*, 470 F.2d 915 (2d Cir. 1972), a tax evasion prosecution, the Government was permitted to introduce evidence that the defendant had submitted false copies of his tax returns to his employer.

Finally, it should be noted that the scope of this Court's review of Judge Cannella's decision is exceedingly narrow. This Court has observed that district judges have a "wide range of discretion" in admitting similar act evidence. *United States* v. *Santiago*, *supra*, 528 F.2d at 1135. In *United States* v. *Leonard*, *supra*, Judge Friendly recently made the following observation concerning similar act evidence:

> "In any case, the weighing of the probative value of the evidence against its potentially prejudicial effect is primarily for the trial judge who has a feel for the effect of the introduction of this type of evidence that an appellate court, working from a written record, simply cannot obtain. We said in *United States* v. *Ravich*, 421 F.2d 1196, 1203-04 (2d Cir.), *cert. denied*, 400 U.S. 834, 91 S. Ct. 69, 27 L.Ed. 2d 66 (1970), citing *Cotton* v. *United States*, 361 F.2d 673, 676 (8th Cir. 1966); and *Wangrow* v. *United States*, 399 F.2d 106, 115 (8th Cir.), *cert. denied*, 393 U.S. 933, 89 S.C. 292, 21 L.Ed. 2d 270 (1968), that 'his determination will rarely be reversed on appeal.'" 524 F.2d at 1092.

Judge Cannella can scarcely be said to have acted capriciously here. He listened to extensive argument from counsel (Tr. 68-81) before admitting the evidence, and gave the jury a careful limiting instruction in his charge (Tr. 158-159), to which no objection was made. His determination was in all respects proper.*

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* Even if Judge Cannella erred in admitting the similar act evidence, which we submit he did not, the error was harmless. *See United States* v. *Williams*, 523 F.2d 407 (2d Cir. 1975). The Government's evidence, which consisted in essence of Mauldin's fingerprints on the surveillance camera, was overwhelming, and admitted of only one rational explanation. It may be, as Mauldin argues (Br. 10), that fingerprint evidence is not infallible, *see United States* v. *Durant*, Dkt. No. 76-1198 (2d Cir. Nov. 24, 1976), but no sign of its fallibility can be found in this case.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Jeremy G. Epstein being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 15th day of February, 1977 he served two copies of the within sheet by placing the same in a properly postpaid franked envelope addressed:

Legal Aid Society
Federal Defender Services Unit
509 United States Courthouse
Foley Square
New York, NY 10007

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing in the United States Courthouse Annex, Foley Square, Borough of Manhattan, City of New York.

Jeremy G. Epstein

Sworn to before me this

15th day of February, 1977

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541-75
Qualified in Kings County
Commission Expires March 30, 1977